No. 483

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHARLES E. BOINEAU, JR., *et al.*, *Appellants*

v.

O. FRANK THORNTON, Secretary of State of South Carolina, *et al.*, *Appellees*

On Appeal From The United States District Court For The Eastern District of South Carolina

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JURISDICTIONAL STATEMENT

RALPH E. BECKER
1700 K Street, N. W.
Washington, D. C.

HOOVER C. BLANTON
1414 Lady Street
Columbia, South Carolina

ROBERT E. GOOSTREE
2000 G Street, N. W.
Washington, D. C.

Attorneys for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JURISDICTIONAL STATEMENT

Appellants appeal from the final order of the United States District Court for the Eastern District of South Carolina, entered on August 10, 1964, denying Appellants' motion for summary judgment and dismissing their complaint, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of South Carolina, Columbia Division, is not yet reported. The order and the opinion of the Court are set forth in Appendix A hereto.

JURISDICTION

This action was brought under 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983 and 42 U.S.C. § 1988 for a temporary and permanent injunction against enforcement of § 23-357, South Carolina Code, by reason of unconstitutionality under the First, Fourteenth and Nineteenth Amendments to the Constitution of the United States. The judgment of the District Court was entered on August 10, 1964, and notice of appeal was filed in that court on August 13, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Baker* v. *Carr*, 369 U.S. 186; *Gray* v. *Sanders*, 372 U.S. 368; *Wesberry* v. *Sanders*, 376 U.S. 1; *Reynolds* v. *Sims*, 377 U.S. 533; *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633; *Davis* v. *Mann*, 377 U.S. 678; *Roman* v. *Sincock*, 377 U.S. 695; *Lucas* v. *Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether petitioners are denied equal protection of the laws under the Fourteenth Amendment by the enforcement of § 23-357, South Carolina Code, requiring that votes not be counted if a voter votes for more or less persons than the number of

offices to be filled, because the words "or less" of that section have no reasonable relation to the purpose of the statute: determination of voter intent in counting ballots?

2. Whether petitioners are denied the constitutional right to have their votes counted as cast by the provisions of § 23-357 because their votes will not be counted in the November General Election unless they cast ten votes for the State House of Representatives?

3. Whether petitioners are denied liberty of political choice because they are coerced by § 23-357 to vote for persons against their will in order to have any votes counted; and are denied equality of political choice because burdens are placed upon them that are not placed upon voters of the dominant political party?

4. Whether petitioners are denied equal protection of the laws because § 23-357 by its necessary force and effect dilutes and debases the weight and effect of their votes?

5. Whether petitioner-candidates are deprived of due process of law and equal protection of the laws in that § 23-357 deprives them of the right to be candidates upon an equal basis with other duly qualified candidates?

6. Whether petitioners are denied by § 23-357 the right to organize politically and to make effective use of political organization in political competition, violating the First and Fourteenth Amendments?

7. Whether petitioner Ellis is denied by § 23-357 the right to vote or to choose to vote on the basis of sex in violation of the Nineteenth Amendment?

8. Whether the District Court erred in dismissing petitioners' complaint for want of equity?

STATUTES INVOLVED

Section 23-357, Code of South Carolina, 1962, the constitutionality of which is challenged by Appellants, provides:

> "Ballot improperly marked.—If a voter marks more or less names than there are persons to be elected or nominated to an office or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office; but this shall not vitiate the ballot, so far as properly marked. Nothing herein shall be construed to prevent any voter in a general or special election from voting for any qualified person, other than those whose name are printed on the ballot, by writing in the name of the person opposite the office."

Other constitutional provisions and statutes involved are the First, Fourteenth and Nineteenth Amendments to the Constitution of the United States, 42 U.S.C. § 1983 and 42 U.S.C. § 1988, which are set forth in pertinent part in Appendix B hereto.

STATEMENT

Appellants are United States citizens, qualified voters of South Carolina, and of Richland County where they reside. Appellants Boineau and Turbeville are additionally the only two qualified candidates of the Republican Party for the State House of Representatives from that County, competing against a full Democratic Party slate of ten candidates. Ten seats are allotted to Richland County. Appellees are members of the State Board of Canvassers, the County Board of Canvassers, managers of elections in two voting precincts and the County custodian of voting machines.

Appellees are charged by Title 23, South Carolina Code, with the enforcement of § 23-357 of that Code, and with various duties involving enforcement and application of § 23-357, as set forth at length in Appellants' complaint and admitted in Appellees' answer. § 23-357 does not set qualifications for voters.

Appellees by their answer admit that the words "or less" of § 23-357 are construed and applied to require that, where more than one office of the same class is to be filled, as for a County delegation to the State House of Representatives, voters must vote for as many candidates for the class of offices to be filled as there are vacancies to be filled, under penalty of having no votes for that class of offices counted.

Appellants on June 27, 1964, filed complaint for preliminary and permanent injunction with the United States District Court for the Eastern District of South Carolina, alleging the unconstitutionality of § 23-357, South Carolina Code, under the First, Fourteenth and Nineteenth Amendments. A three-judge District Court was convoked. Appellants moved for summary judgment on July 20, 1964. The cause was heard on July 30, 1964, and on August 10, 1964, the District Court filed its opinion and order, denying summary judgment and dismissing the complaint for want of equity.

The District Court found that, although the enforcement of § 23-357 as so construed may in practice result in some dilution in the weight of Appellants' votes and votes cast for them and such dilution can be minimized only at the cost of some additional burdens upon Appellants and others similarly situated, § 23-357 is not in these respects arbitrarily unfair and discriminatory.

since the Legislature's purpose was the avoidance of dilution of votes and the achievement of full participation of the electorate in ultimate decisions. The complaint was dismissed for want of equity.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal affect directly the voting rights of some 386,000 voters in South Carolina, and inferentially those of some 560,000 voters in Alabama, some 638,000 voters in Louisiana, and some 1,368,000 voters in North Carolina, because the latter three states have statutes similar in effect to that being challenged. 1961 *Acts of Alabama*, Vol. II, Act No. 154, § 2; 1950 *Louisiana Revised Statutes* § 18-351; *General Statutes of North Carolina* § 163-175(6) (1964). These issues are of importance not only to these 2,952,000 voters but are of almost equal import to every voter of the nation, since the policy of § 23-357, South Carolina Code, furnishes a device for rendering minorities increasingly impotent whether a minority of occupation, race, or political party by diluting the effectiveness of minority votes in terms of those of the dominant majority. Moreover, fundamental and novel questions are raised as to compulsory voting and liberty of political choice, equality of political choice as among voters, the right of candidates to equality of opportunity to compete for election, the right to make effective use of political organization, and the rights of voters under the Nineteenth Amendment.

1. Certain issues involved are essentially applications of the principles laid down in *Reynolds* v. *Sims*, 377 U.S. 533, and the fundamental views of the nature of political rights guaranteed to citizens of the United States by the First and Fourteenth Amendments upon which the principles embodied in *Reynolds* are based.

The Supreme Court in *Reynolds*, as in *United States v. Bathgate*, 246 U.S. 220, held that the right to vote is individual and personal. The denial of equal protection of the laws found to exist in *Reynolds* is not limited, therefore, to denial of substantially equal weight and effect of votes cast in different places, but is likewise existent in denial of substantially equal weight and effect of votes as between different individuals in the same place. Under § 23-357 of the South Carolina Code, Appellants and others similarly situated are subjected to the dilution of the weight and effectiveness of their votes in comparison to votes cast for candidates of the opposing party. Appellants and others similarly situated are required by the statute to vote for eight other persons, in order that their votes will be counted for the two persons for whom they freely choose to vote. Their votes are accordingly of substantially less weight than those cast for candidates of the opposing party, being of approximately one-fifth the weight of such other persons' votes. This result was not avoidable by Appellants, since they and indeed no individual voter can control the number of nominees presented by a party.

2. A more fundamental defect of the statute is its abrogation of what the Court has in *Reynolds* referred to as "the right to exercise the franchise in a free and unimpaired manner." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562. This right, protected by the First and Fourteenth Amendments, is denied by the compulsory voting required by § 23-357. Appellants are by the statute deprived of their liberty to vote only for persons of their choice, to vote against other persons, or not to vote, according to their personal desires. The District Court found that compulsory voting is within the

constitutional powers of the State and hence a legitimate purpose of the statute. Thereby, a completely novel constitutional issue is raised, although it appears that the Supreme Court proceeded upon a theory of liberty of electoral choice in *Reynolds*. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 559.

3. If, as Appellants contend, compulsory voting is not a constitutionally permissible purpose, and if, as the Court has made clear, denial of racial or other minority rights to vote is not a constitutionally permissible purpose, the remaining legitimate purpose which § 23-357 can have is to authorize that votes not be counted where it is impossible to ascertain the intent of the voter. The words "or less" of § 23-357 have no reasonable relation, indeed no relation, to this purpose. A class of voters, including Appellants, is discriminated against without a reasonable basis by § 23-357.

4. The alternative permitted by the statute to Appellants acceding to the compulsion to vote is equally a deprivation of Fourteenth Amendment rights, namely that votes cast fewer in number than there are candidates to be elected are not counted. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted. *Ex parte Yarbrough*, 110 U.S. 651; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299.

5. A further effect of § 23-357 is to deny to Appellants, and indeed to anyone not an adherent of the dominant political party, equality in the exercise of

their political choice. Voters who wish to vote for candidates other than those of the dominant party (or in a primary election, for candidates other than those of the dominant faction of a party) have additional burdens imposed on them that are not imposed on voters who wish to vote for candidates of the dominant party. These additional burdens include inability to vote and have votes counted by activating the "straight ticket" lever, the necessity of writing in votes to avoid having their votes invalidated, and that instructions about the technique of writing in must be sought, imperiling the secrecy of the vote.

6. Appellants Boineau and Turbeville are deprived of the right to compete for election upon an equal basis with their opponents. The effect of § 23-357 is to require that Appellant-candidates, or any independent candidate, in an election where more than one candidate is to be elected, receive a greater percentage of the votes cast to be assured of election than the candidates belonging to a full slate. The discriminatory effect of § 23-357 in this respect is no less invidious because it is possible for a minority party to nominate a full slate of candidates. Parties are not required by South Carolina law so to nominate, and it is questionable whether such a requirement could constitutionally stand under the First and Fourteenth Amendments. Rather, the necessary discrimination of § 23-357 is demonstrated by its application to independent candidates, it being impossible for an independent candidate to list himself more than once to constitute himself a full ticket.

7. Inevitably, the enforcement of § 23-357 results in discouragement of minority political party organization by discouraging candidacies, and by burdening

voters. Thereby § 23-357 denies to Appellants the right of political organization and association guaranteed by the First and Fourteenth Amendments. *Cf. National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449.

8. It would not be seriously contended that the application of § 23-357 to deprive Negroes of the right to vote for Negro candidates would be permissible under the Fifteenth Amendment. Accordingly, the application of § 23-357 to deprive persons of either sex of voting for candidates of that sex is impermissible under the Nineteenth Amendment. Appellant Ellis contends, not that the Nineteenth Amendment guarantees a right to have women candidates on the ballot, but that the Nineteenth Amendment is violated by a statute, which as construed and applied, denies to women the right to vote only for women candidates.

It is submitted that no inequality of voting weight would result from the invalidation of the words "or less" of § 23-357. On the contrary, under the statute without these words, each voter regardless of race, place, occupation, sex, or party, would have substantially equal voting rights. Each voter would have, in the circumstances of Richland County, an equal right to cast from one to ten votes. Liberty of political choice would be restored, in that each voter could choose freely how his vote or votes would be distributed and for whom. The "individual and personal right of franchise" would thereby be vindicated. Appellants' action for the vindication of this individual and personal right that each vote of qualified voters be given as much weight as any other vote should not have

been dismissed by the District Court for "want of equity." *Wesberry* v. *Sanders*, 376 U.S. 1.

Respectfully submitted,

RALPH E. BECKER
1700 K Street, N. W.
Washington, D. C.

HOOVER C. BLANTON
1414 Lady Street
Columbia, South Carolina

ROBERT E. GOOSTREE
2000 G Street, N. W.
Washington, D. C.

Attorneys for Appellants.